1998

Franklin Covey Client Sales, Inc v. David Melvin : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

APPELLATE CASE NO. 981850-CA

FRANKLIN COVEY CLIENT SALES, INC.

Appellee

v.

DAVID MELVIN PR 15

Appellant

Appeal from The Third Judicial District Court
In And For Salt Lake County State Of Utah

David S. Young, Judge

Appellant's Brief

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JURISDICTION OF THE APPELLATE COURT

The Utah Supreme Court has jurisdiction pursuant to Utah Code Ann § 78-2-2(3)(j), accordingly the appellant filed a Notice of Appeal on December 8, 1998, in the Third Judicial District Court, Salt Lake County to the Utah Supreme Court. By letter dated April 13, 1999, the Supreme Court poured-over authority in this case to the Court of Appeals for disposition. See Utah Code Ann. §78.

ISSUES PRESENTED FOR REVIEW

I. The trial court erred in finding that specific personal jurisdiction existed in this case and that the defendant was subject to the long arm of the Utah courts and the trial court should have dismissed the case.

II. The trial court lacked subject matter jurisdiction, because the plaintiff was not the real party in interest pursuant to Rule 17 U.R.C.P. nor was it a proper party pursuant to §78-33-2 Utah Code Ann. and the trial court should have dismissed the case.

III. The trial court erred in mechanically adopting the findings of fact and conclusions of law prepared and presented by counsel for the plaintiff.

IV. The trial court's findings of facts are insufficient to support its conclusions of law and therefore its rulings are a nullity. The trial court further erred in ignoring and failing to rule upon this issue when it was raised by defendant in its U.R.C.P. 60(b)(1) motion.

STANDARD OF APPELLATE REVIEW WITH SUPPORTING AUTHORITY

I. In jurisdictional matters, this Court, "grant(s) no deference to the conclusions of the trial court." *Ross v. Schackel*, 920 P. 2d 1159, 1162 (Utah 1996). *SII Megadiamond, Inc. v. American Superabrasives Corp.* 969 P.2d 430 (Utah 1998). "An appeal from decision that presents only legal questions . . . reviewed for correctness." *Arguello v. Industrial Woodworking Machine Co.*, 838 P. 2d 1120, 1121 (Utah 1992); *Stairways v, Curry*, UTDk 980025 (Utah 1999). Further, in cases involving review of Rule 60(b) U.R.C.P. where the issue is jurisdictional, the standard of review is de novo. "if jurisdiction is lacking, the judgment cannot stand without denying due process to the one against whom it runs." *Bonneville Billing v. Whatley*, 949 P. 2d 768, 771 (Utah App. 1997); *Lund v. Hall*, 938 P.2d 285 (Utah 1997). This issue was preserved on appeal in both of Defendant's Motion to Dismiss with accompanying memoranda (I. 31-206 and I. 249-91).

II. Subject matter jurisdiction is the power and authority of the court to determine a controversy and without which it cannot proceed." *Thompson v. Jackson*, 743 P.2d 1230, 1232 (Utah App. 1987). If a court acts beyond its authority those acts are null and void. . . When a matter is outside the court's jurisdiction it retains authority only to dismiss the action." *Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569, 570 (Utah App. 1989). Rule 17(a) "contemplates that the party bringing the suit has the capacity to sue, otherwise the suit is a nullity." *Estate of Martin Haro v. Haro*, 887 P.2d 878, 880 (Utah App. 1994).

"We independently determine whether the appeal is proper when reviewing a jurisdictional issue." *Allred v. Allred*, 835 P.2d 974, 977 (Utah App. 1992). Further, in cases involving review of Rule 60(b) U.R.C.P. where the issue is jurisdictional, the standard of review is de novo. "if jurisdiction is lacking, the judgment cannot stand without denying due process to the one against whom it runs. Therefore, the propriety of the jurisdictional determination, becomes a question of law upon which we do not defer to the trial court." *Bonneville Billing v. Whatley*, 949 P.2d 768, 771 (Utah App. 1997); "We accord no deference to the trial court's conclusions of law but review them for correctness." *Lund v. Hall*, 938 P.2d 285 (Utah 1997). This issue was preserved on appeal in both of Defendant's Motion to Dismiss with accompanying memoranda (I. 31-206 and I. 249-91)[1].

III. "Utah's appellate courts look to the record and will affirm the findings if there is 'no indication from the record . . . that the trial judge failed to adequately deliberate and consider the merits of the case. *Automatic Control Products Corp. v. Tel-Tech, Inc.* 780 P.2d 1258, 1260. Findings of fact prepared by the court "are drawn with the insight of a disinterested min" and are "more helpful to the appellate court" than those prepared by counsel. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964). It is for this reason that the federal courts appear to have almost uniformly adopted the rule that while findings

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[1] In addition, plaintiff notes in its Memorandum in Opposition to Melvin's Motions for Relief from Judgment or Order that defendant has raised this issue 11 times before the trial court. (See footnote 6). (I. 597-617)

prepared by counsel are sufficient under the federal analogue to U.R.C.P. 52, appellate courts "will feel freer in close cases to disregard a finding or remand for further findings if the trial court did not prepare them him [or her] self." 9 Wright & Miller, at 707. See also, *Ramsey Construction Co. v. Apache Tribe of Mescalero Reservation*, 616 F.2d 464 (10th Cir. 1980) *Automatic Control* at page 1264. This issue was not raised with the trial court because it did not become relevant until after the trial court made its rulings. Defendant did file two post trial Motions for Relief from the trial court's Order, one claimed newly discovered evidence and the other raised parts of this issue, e.g. that the trial court had extended its order to cover Maryland even though Maryland law had not been briefed for the court. The trial court ruled on the first post trial motion, denying it, and ignored the second completely.

IV. "It has long been the law in this state that conclusions of law must be predicated upon and find support in the findings of fact and that the judgment or decree must follow the conclusions of law." *Gillmor v. Wright*, 850 P.2d 431, 436 (Utah 1993). "Because a summary judgment resolves only questions of law, we give no deference to the trial court's determinations. We affirm only if the decision before us was correct." *Retherford v. AT&T Communications,* 844 P.2d 949, 958 (Utah 1992). As stated previously this issue was preserved in the defendant's Rule 60(b)(1) motion which was ignored by the trial court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF CENTRAL IMPORTANCE

U.S. Constitution: Fourteenth Amendment

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 17(a). Parties plaintiff and defendant, U.R.C.P.

(a) Real party in interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's name without joining the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the state of Utah. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Utah Code Ann. §78-33-2

Any person interested under a deed, will or written contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relation thereunder.

Utah Code Ann. §78-51-32. Authority of attorneys and counselors.

An attorney and counselor has authority:

(1) to execute in the name of his client a bond or other written instrument necessary and proper for the prosecution of an action or proceeding about to be or already commenced, or for the prosecution or defense of any right growing out of an action, proceeding or final judgment rendered therein.

(2) to bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk or entered upon the minutes of the court, and not otherwise.

Utah Code Ann. §78-51-33. Proof of authority for appearance.

The court may on motion of either party and on the showing of reasonable grounds therefor require the attorney for the adverse party, or for any one of several adverse parties, to produce or prove by his own oath or otherwise the authority under which he appears, and until he does so may stay all proceedings by him on behalf of the parties for whom he assumes to appear.

STATEMENT OF THE CASE

David Melvin, a legal resident of the State of Maryland and a citizen of the United Kingdom, the appellant/defendant (hereinafter defendant) was employed by the Franklin Covey Company, Inc. (FCC) from January, 1992, until September 12, 1997. (Federal court filing, Response to Memorandum in Opposition to Motion to Dismiss-- Index – hereinafter I. – 31-206)[2]. FCC. terminated the defendant in August, 1997, effective as of September 12, 1997. Subsequently, the defendant sent a demand letter to the FCC. which was received by that company on February 8, 1998. (I. 1-13). FCC never responded to that demand letter. Instead, plaintiff Franklin Covey Client Sales, Inc. (FCCS) filed its complaint in the Third Judicial District Court, Salt Lake County, Utah seeking Declaratory Relief on February 13th . (I. 1-13). The defendant's first notice of this action was by service of a summons upon him at his home in Silver Spring, Maryland on February 14th . (I. 14-15; I. 207-210). The Defendant filed a Notice of Removal to U.S District Court, State of Utah on March 9th and the plaintiff filed a Motion for Remand on March 17th .[3] (I. 31-206). Subsequently, defendant filed a Motion to Dismiss on March 24, 1998, alleging lack

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[2] All references to the record, pursuant to Rule 24, Utah Rules of Appellate Procedure, are made based upon the Court of Appeal Index which was faxed to the appellant by the Clerk of this Court, since Appellant has no access to the original documentation in Utah.

[3] Throughout this entire period defendant was *pro se* until Maryland counsel was admitted *Pro Hac Vice* on October 30, 1998.

of personal jurisdiction and the fact that the plaintiff was not a proper party pursuant to U.R.C.P. 17(a). (I. 31-206). On April 10, 1998, plaintiff filed a Motion for Summary Judgment. Plaintiff filed a Memorandum in Opposition to Defendant's Motion to Dismiss for Lack of Personal Jurisdiction or to Change Venue on April 13, 1998. (I. 31-206). On May 13, 1998 an Order granting Plaintiff's Motion for Remand was filed by Judge Dee V. Benson, U.S. District Court for the District of Utah, Central Division. (I. 31-206).

Plaintiff then filed a Notice to Submit for Decision or Hearing on May 19th . (I. 211-216). Defendant filed his Opposition to Summary Judgment on May 29th (I. 224-43) and plaintiff filed its Reply on June 9th . (I. 295-305). In June, 1998, venue was changed from U.S.D.C. to Utah 3rd District Court. (I. 244-7).

Defendant filed a Motion to Dismiss before Judge Young, Third Judicial District Court, on June 3rd alleging, as it had in its previous motion, that the court lacked personal jurisdiction over the defendant and that the plaintiff was not a real party at interest nor did privity exist between the parties. It further alleged that Declaratory Relief was inappropriate, as material issues were in dispute and requested postponement of any hearing until after discovery. (I. 249-91). On June 9th, plaintiff filed a document entitled "Franklin Covey Co. Consent to be Bound," signed by plaintiff's counsel (but unsigned by any FCC representative), which purported to be an assignment of FCC's rights to pursue this matter to FCCS. (I. 292-4). Further, on June 9th, Plaintiff sent defendant a Notice of Hearing scheduling a hearing for Friday, June 19th in Judge Young's courtroom. (I. 306-7). On June 10th, defendant filed a

Motion to Continue the Hearing Date informing the court that he resided in Maryland, that said date chosen unilaterally by plaintiff's counsel conflicted with prior work commitments of the defendant, and requested, pursuant to Rule 4-501(5), Utah Code of Judicial Administration to participate by telephone. (I. 327-30)[4]. By letter dated June 15th, to plaintiff's counsel, defendant reviewed these issues and the fundamental unfairness pertaining thereto as well suggesting that the hearing be continued until after the completion of discovery. (I. 320-3). On June 15th plaintiff filed an Amended Notice of Hearing, scheduling a hearing for Friday, June 26th in Utah. (I. 314-6). Plaintiff filed a Motion to Strike the second Motion to Dismiss on June 16th. (I. 317-9). Defendant filed his response to the Motion to Strike on June 23rd . (I. 371-5). On June 23rd, plaintiff filed a Notice to Submit for Decision (I. 357-9) as well as a Request for a Consolidated Hearing. (I. 354-6). On June 23rd, defendant filed a Motion to Stay, noting that a decision could be rendered without a hearing – since only the defendant had filed sworn affidavits which were unanswered by plaintiff (who had chosen to rely on misstating the contents of defendant's affidavits, rather than file any sworn affidavits supporting its contentions), with the remaining evidence before the court documentary. The defendant requested that the court choose to rule without holding a hearing (if his request for postponement was denied), noting (a) the hardships posed by his attendance at a hearing in Utah; (b) that

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[4] Unlike any other court in which counsel has practiced, the Utah Rules of Civil Procedure do not place any requirements on the district court to notify the parties of rulings made and/or filed. Defendant, *pro se* and residing 2000 miles from the courthouse, was placed under a constant disadvantage in terms of finding out

plaintiff had waived its right to a hearing though lack of compliance with Rule 4-501(b)(3) Utah Code of Judicial Administration requiring that a hearing request be filed with a party's principal memorandum; (c) the lack of any communication with the defendant by the court; (d) the irreparable harm that would be caused by requiring the defendant to defend himself at a hearing over 2000 miles from his home, on short notice without adequate time to prepare; and , (e) reiterating defendant's request to participate by telephone. (I. 360-70).

Judge Young failed to rule on any of these motions. Instead on June 26th, a hearing was held in Utah before Judge Young without the presence of the defendant, (while plaintiff's counsel was present he presented no evidence nor called any witnesses) in which, unsurprisingly (based on these facts), Judge Young granted both plaintiff's Motion for Summary Judgment and Motion for Declaratory Judgment. On July 9th the Index reflects that an Order was filed (I. 392). As Defendant never received a copy of this Order, its contents are unknown. On July 14th, defendant filed Objections to plaintiff's proposed Order. (I. 395-7). On July 14th the Order granting Summary Judgment was signed. (I. 393-394). (The Order granting Summary Judgment has a written notation "7/14/98, objections denied.") On July 21st, defendant filed objections to plaintiff's proposed Order regarding Declaratory Judgment. (I. 398-402). On July 27th the Order granting Declaratory Judgment was filed. (Defendant's objections were never ruled upon.) (I. 410-412). On July 27th and again on the 29th, Defendant filed Motions for Extension of Time, requesting

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information on the status of the case. Phone calls were not returned and requests for

additional time to file Motions for Reconsideration due to newly discovered evidence. In his motions defendant alleged recent newly discovered evidence which supported his contention that FCCS was not the real party in interest. "Unfortunately, the person who possesses this information is currently outside of the continental U.S. and will not return until late July," thus necessitating a short delay (I. 413-9). Judge Young never responded to these motions, although the record indicates that an unsigned Order was filed on August 10th . (I. 420-23). (Defendant never received a copy of the Order nor is he aware of its contents.)

Defendant did not learn of the entry of the Declaratory Judgment Order until August 28th. The pertinent facts were contained in an affidavit submitted as an attachment to defendant's Motion for Extension of Time for Appeal: (I. 426-9)

a. The *pro se* defendant in the case of Franklin Covey Client Sales, Inc. v. David Melvin, in the Third Judicial District Court, Salt Lake County, State of Utah states under the penalties of perjury that:

b. I am also the plaintiff in the case of Melvin v. Franklin Covey Co. and Franklin Covey Client Sales, Inc., filed in the U.S. District Court for Maryland, Greenbelt Division, in which I was represented by Mark Hessel, Esq. of Maryland.

c. In late July, 1998, I informed Mr. Hessel that my family and I would be out of the state of Maryland for most of the month of August on family and related matters and expressed my concern about keeping

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information were frequently ignored.

abreast of the Utah case. We discussed the best way for me to do so, and, Mr. Hessel agreed to serve as intermediary during my absence. I was present, in Mr. Hessel's office, when he phoned Steven Bednar, attorney for the plaintiff, and heard him explain to Mr. Bednar as we would be absent from Maryland for most of August, he, Mr. Hessel, had agreed to serve as a point of contact for all mail and/or other matters related to the Utah case. I then provided Mr. Hessel with a contact number where I could be reached and confirmed with Mr. Hessel that I would regularly (at least once per day) check our Maryland voice mail.

d. During our absence , my wife and I checked our Maryland voicemail at least once per day but received no messages from Mr. Hessel. I also called Mr. Hessel's office 2-3 times per week every week. In most instances I got his voicemail and left a message. On two occasions I spoke with Mr. Hessel. During the first, prior to August 13, Mr. Hessel informed me that Mr. Bednar had contacted him about Mr. Hessel's status in the Utah case. Mr. Hessel told me he had written a letter to Mr. Bednar confirming that he was not representing me in the Utah case but simply serving as point of contact for communications during August. For the next 2 weeks I left several messages for Mr. Hessel but received no return calls. On August 28, 1998, I spoke to Mr. Hessel. At that time he informed me that he had "a letter on his

desk dated August 13, 1998" from Mr. Bednar which he had received on August 16, 1998. When asked what the letter said, Mr. Hessel replied, "I don't know, I haven't read it," and proceeded to read it to me.. Mr. Bednar's letter informed me contained the information that Judge Young had granted Declaratory Judgment on July 27th. . When I asked Mr. Hessel why he had not informed me of this previously, he offered no response or explanation. Subsequent inquiries made to Mr. Hessel have been no more productive and he no longer serves as our family's personal attorney.

e. While Mr. Hessel's actions were unfortunate, they were also totally unforseeable.

f. Upon learning of the existence of Mr. Bednar's letter and Order, I immediately obtained copies from Mr. Hessel the next day. Upon receipt I took the following actions:

1) I immediately filed a notice of appeal[5].

2) I wrote to Mr. Bednar explaining the situation." Defendant also immediately called plaintiff's counsel, and explained the situation. Foolishly, as it turned out, defendant requested that the parties work something out so that defendant wasn't prejudiced unfairly. Plaintiff's counsel turned down the request for an amicable resolution and chose to press the unfortunate circumstances to its full advantage. (See

Appellant's Motion to Stay filed with the Utah Supreme Court, November 5, 1998.)

Defendant also filed a number of motions with the trial court seeking relief from its judgment raising the issues that are raised in this appeal, (I. 502-550), all of which were opposed by the plaintiff. (I. 564-96). Plaintiff filed a Motion for Summary Disposition with the Supreme Court based on the untimely filing of the defendant's appeal which was granted on December 9th .

Judge Young signed an Order admitting defendant's Maryland counsel *Pro Hac Vice* on October 26th . (I. 628-30). On November 10th Judge Young issued an opinion denying all of the defendant's post trial motions. (I. 662-666). The instant appeal from that opinion was filed on December 8, 1999. (I. 667-76). On January 12, 1999, plaintiff filed a Motion for Summary Disposition which was "deferred/denied" by the Utah Supreme Court on February 9th. The Court further stated "[T]he parties are asked to include the jurisdictional issue in their briefs." (See Attachment A). On April 13th the Utah Supreme Court transferred jurisdiction to this Court.

STATEMENT OF FACTS

Defendant, a resident of Maryland and citizen of the United Kingdom, was an employee of Franklin International, Europe, a division of Franklin International Institute, Inc. (a predecessor to FCC) in the U.K. as an Account Executive and training consultant. He was employed in this capacity from January, 1992, until July, 1995. As that time he was consistently ranked number one in productivity. (See

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[5] While the Notice of Appeal was mailed to the Clerk of Court the next day,

Response Memorandum to Opposition to Motion to Dismiss, - hereinafter Response Memorandum - Defendant's Attached Supplemental Declaration, I. 31-206)[6] FCC, is an international professional services and leadership development company with over 4,200 employees (as of August 31, 1998), with total sales of $546,612,000 (again as of 08/31/98). FCC is incorporated in Utah where its corporate headquarters are located. (Company Annual Report, 1998). FCC maintains 10 regional offices based around the globe serving organizations and individuals in more than 30 countries. (Company Annual Report, 1998). FCC owns considerable real estate in Utah, and maintains sales, administrative and warehouse facilities in or near, Salt Lake City; Phoenix; Atlanta; Washington D.C. and, at least 16 locations overseas. (Company Annual Report, 1998).

In 1995, after several years of successful employment with FCC, the defendant, for personal reasons, decided to relocate to the state of Maryland and applied for an intra company transfer to the Shipley Division of FCC in the U.S. On May 31, 1995, defendant signed a letter of agreement in Maryland offering him a job in the U.S. dated May 9th, signed by John Harding, Senior Vice President, Shipley Associates, a division of Franklin Quest (later Franklin Covey) in which he was offered a position as an account executive for the Central Atlantic States with Shipley Associates, a division of FCC. (See Response Memorandum, Defendant's Attached Supplemental Declaration, I. 31-206). He began work on July 5, 1995. His place of

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inexplicably the appeal was not docketed until September 11, 1998.

employment, provided by FCC was an office suite located at 200 Orchard Ridge Drive, Gaithersburg, Maryland in which 5 other individuals also employed by FCC were assigned to sell different FCC products. (See Response Memorandum, Defendant's Attached Declaration, I. 31-206). When he commenced employment he was given responsibility for sales in the Central Atlantic States in the Eastern Region of the U.S. His territory included New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia and the District of Columbia. As an Account Executive, Melvin was responsible for selling a line of FCC's products and services including writing and presentation training and consulting services in the Eastern United States and Europe. (See Response Memorandum, Defendant's Attached Declaration, I. 31-206). At no time was the defendant given responsibility for sales in Utah. (See Response Memorandum, Defendant's Attached Declaration, I. 31-206). Further, Melvin has never resided in Utah. Has no bank account or other financial ties of any kind to Utah. Owns no property in Utah. Pays no taxes in Utah and has no other connection to the state other than the fact he was employed by a company that was headquartered in Utah for a period of years. During his entire tenure with FCC, Melvin made 10 trips almost all consisting of a few days. As listed in his affidavit 9 of the 10 trips were at FCC's behest for conferences or trainings he was required to attend in order to keep his job.. Of the 10 trips, only 5 are relevant to this proceeding as they were the only ones that occurred after Melvin moved to the U.S. and assumed

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[6] For the Court's convenience both affidavits in this section are included in the addendum the Defendant's Declaration is Attachment B and the Supplemental Statement is Attachment C.

employment in Maryland. The 10th trip, for one day on May 30, 1997, was made at the request of FCC for a meeting to be held in Utah, at FCC's insistence, with a former client of Melvin's from the U.K., GEC. (GEC is not a Utah company nor does it maintain a presence in Utah. (See Response Memorandum, Defendant's Attached Declaration, I. 31-206). "Since I knew GEC from when I worked in the U.K., I was asked by Franklin to help its sales staff in Utah understand GEC needs. I attended because FCC requested it. I did not receive any compensation for this trip (although his only compensation at that time was straight commission – thereby depriving Melvin of his ability to earn a livelihood during that period of time.) I did not attempt to sell products or services to GEC in Utah and no sale resulted in Utah at that time." Melvin never received compensation either for the time he expended or his efforts on behalf of FCC. Nor did he receive any commission on any resulting sales. (See Response Memorandum, Defendant's Attached Declaration, I. 31-206). It is upon this extremely slender thread that the plaintiff attempts to deny that it has overreached and to support its claim of specific personal jurisdiction in the Utah.

FCC sponsored Melvin's application for a work status visa with the U.S. Immigration and Naturalization Service stating that his job description was as a"strategic business communications account/channel manager in the Eastern United States and Europe," and the appropriate visas were issued. (See Response Memorandum, Attachment D, I. 31-206). Melvin worked for the company selling its products to customers in his assigned "Eastern Region" in and around Maryland for a period of approximately two years when he was summarily fired on March 31, 1997.

(See Response Memorandum, Attachment A, Dismissal Letter I. 31-206). At no time prior to plaintiff's discharge had he received any negative comments about his job performance. (See Motion to Dismiss, Attachment A, Letter of Congratulations from President and CEO of Franklin Quest. I. 31-206).

After Melvin was terminated, he approached management and asked them to reconsider their decision. He needed the job because his INS Work Visa was only valid if he worked for FCC. After a number of conversations and proposals by Melvin, FCC agreed to rehire Melvin with a substantially different salary structure which was highly detrimental to Melvin and highly beneficial to FCC. (See Response Memorandum, Defendant's Attached Supplemental Declaration, I. 31-206). One element of this contract contained the phrase "according to FCC policy, commissions are paid only for those services delivered while you are employed by Franklin." Melvin signed believing, as detailed in his affidavit, 1) that the "services" referred to Melvin's services to FCC, and; 2) that, based upon his previous knowledge of other former employees with the FCC, this provision would only apply in the case of voluntary departure. (See Supplemental Statement; Opposition to Summary Judgment I. 224-43). Subsequently, after a period of approximately five and one half months, during which Melvin received regular positive feedback about his performance (including such comments as one senior manager's "high regard for Melvin" and that Melvin was a "class act,"), and after receiving assurances that he "would be made whole" in September, 1997, and complying with requests to perform additional (uncompensated) work (partly described above) outside the scope of the

letter of agreement or anticipated employment, he was again summarily fired in August, 1997 at the airport by phone as he was about to board an airplane for a company requested trip to Utah. (See Response Memorandum, Defendant's Attached Supplemental Declaration, I. 31-206). In fact, FCC employees deliberately continued to "string Melvin along" with a variety of promises to lull him into believing that it would make good on its ultimate process to "make him whole" while continuing to take advantage of his talents and services at bargain basement rates. (See Response Memorandum, Defendant's Attached Supplemental Declaration, I. 31-206). When FCC terminated Melvin, it made no offer to compensate him for either work completed by him to date, goods or services sold by him to date, or services rendered to date that led to additional revenues for the company. In fact, it waffled about the date of termination during which time Melvin continued to service FCC clients in order to provide continuity of service. No compensation was offered by FCC (or ever provided) for this service either. (See Response Memorandum, Supplemental Statement, I. 31-206). Melvin applied to his former employer for compensation owed him. The only response was from a current FCC employee, who had been given Melvin's accounts, and who continually called begging Melvin's assistance (for free) in servicing these accounts. When Melvin requested compensation for these requested efforts he was turned down. (See Response Memorandum, Supplemental Statement, I. 31-206). Finally, Melvin sought legal counsel in Maryland. Prolonged negotiations were required just to obtain his personnel file which contained gross inadequacies, including a notation that he had "resigned" from the company for "other

employment," rather than the truth that he was terminated. . (See Response Memorandum, Attached Declaration and Supplemental Statement, I. 31-206; Motion to Dismiss, Attachment 1, I. 249-91). Only after threatening litigation was an offer of compensation forthcoming however strings were attached. Before FCC would release the monies it lawfully owed to Melvin and was withholding, it wanted a release signed by Melvin. Melvin rejected the global release provided by FCC, and instead, signed a much narrower release, drafted by his Maryland attorney. (See Memorandum in Support of Motion for Summary Judgment, Attachment C, 31-206). This release only released FCC from commissions for sales completed (meaning delivered by FCC to the client) before Melvin's termination. It does not cover services and products that were also within Melvin's job requirements and for which monies are owed to him. Nor does it cover services completed by Melvin before his termination, that led to income for FCC after Melvin's termination. While FCC's part of the performance bargain may not have been complete, Melvin had completed his part of the process and had successfully provided the services that were within his job purview. (I. 224-43). This release was accepted by FCC who then paid the compensation. Subsequently, Melvin, through his Maryland attorney sent a demand letter to FCC's general counsel at FCC corporate headquarters in Utah requesting compensation for a variety of other compensation not covered by the release or the compensation previously paid. The demand letter included a period of time during which Melvin would refrain from taking further action in order for Melvin and his employer to find a mutually satisfactory solution without resort to litigation. (I. 224-

43, Attachment B). In response, in less than 1 week from FCC's receipt of this letter, Melvin was served with a summons and complaint at his Maryland home on a weekend, by FCCS, claiming to be his employer and requesting declaratory judgment in Utah. (See Response Memorandum, Supplemental Statement, I. 31-206). Melvin, as he has repeatedly made clear to the trial court judge, (See Response Memorandum, Attached Declaration, Supplemental Statement, I. 31-206; Motion to Dismiss, Attachment 1, I. 249-91), had never heard of FCCS, had had no prior contact with FCCS, nor knew of any privity that ever existed between them. In response, rather than amending its complaint as permitted by the Utah Rules of Civil Procedure, FCCS filed a dubious document entitled "Consent to be Bound by Judgment and Assignment" signed by counsel for FCCS on behalf of FCC (I. 292-92) purporting to "assign any rights which may be necessary, (if any) to entitle Plaintiff to prosecute this action as the real-party-in-interest." The only evidence ever presented by the plaintiff to support this contention was a W-2 issued to Melvin by FCCS (for the fiscal year 1997). This form was issued in 1998, several months after Melvin had been terminated. (I. 597-617, Exhibit D). It is by this additional slender thread that FCCS hangs its hopes on establishing subject matter jurisdiction. Only after the trial court had issued the Declaratory Judgment Order and defendand had filed a post trial motion requesting relief from the Order did the plaintiff for the first time put forth the novel argument that the "Consent to be Bound" (though previously offered for its probative value) was now "not an actual assignment but merely notice to the court that an assignment (which was never entered into evidence) had occurred. (I. 597-

617). In this same post trial document, plaintiff's counsel, for the first time, entered a document actually signed by officers of FCC rather than counsel for the plaintiff, neither dated (therefore impossible to tell when actually executed), nor under oath, alleging it to be the actual assignment. The employer was not a party to the suit. Further, to Melvin's knowledge, counsel for the FCCS has never filed an appearance with the trial court in which the said employer acknowledges counsel for FCCS is also FCC's counsel, with the right to act on its behalf. [See Utah Code Ann. §78-51-32 (2)]. In fact Melvin later discovered that in unrelated litigation in California, counsel for FCC was maintaining a position in direct contradiction to that maintained by counsel for FCCS in the instant case. In his Motion for Post Trial Relief, Melvin provided the court with a copy of a pleading in a California case in which FCC was the defendant and in which case FCC took a contradictory position before the California court than the one taken here. (Memorandum for Relief from Judgment or Order, Attachment B, 523-546). This was first brought to the court's attention on July 27, 1997. (Defendant's Motion for Extension of Time, I. 413-9). Nevertheless, FCCS was granted first Summary Judgment on July 14, 1998 and later Declaratory Judgment on July 27, 1998, the Declaratory Judgment purporting to provide relief both under Utah and Maryland law. (I. 393-4 and 410-2). The trial Court's findings mirror exactly the proposed findings propounded by the plaintiff. (Compare Attachments A and B to I. 393-4, and 410-2). For example, the trial court's Order extended its findings to include the State of Maryland even though Maryland case law was neither briefed nor argued to the court. However, this extension to the state of

Maryland was included in the proposed findings propounded to the trial court by the plaintiff which the trial court mechanically adopted.

In addition, a review of the only transcript regarding this matter indicates that the trial court was confused as to the facts and misunderstood and misstated on the record Melvins's ties to Utah which formed the basis for its finding that *in personam* jurisdiction existed, stating:

"The Court: Remind me of the jurisdictional issue.

Mr. Bednar: Mr. Melvin contends that he is not subject to personal jurisdiction in Utah.

The Court: Don't your underlying contracts originate in Utah and are they subject to interpretation by Utah courts?"

Mr. Bednar: The letter agreement that determines his compensation does not have a choice of law or venue provision. Our basis for sustaining personal jurisdiction is that Mr. Melvin in his complaint in Maryland alleges that he came here to Utah, that he conducted business here by attempting to recruit clients and he is seeking compensation (sic) that very activity, and that, therefore, specific person jurisdiction does exist. But it may be wise to make a ruling on that motion.

The Court: All right. The court finds that there is personal jurisdiction in the case." (Transcript I. 686 at page 6). The trial judge having misinterpreted completely the defendant's pleadings, and having been mislead as to the defendant's actual contacts with Utah, inquired no further and agreed to have plaintiff's counsel draft Orders for both motions. The legal battle that followed is fully set forth above.

SUMMARY OF ARGUMENTS

I. Lack of Personal Jurisdiction.

A. Defendant lacked the minimum contacts necessary to support jurisdiction under the Fourteenth Amendment's guarantee of due process.

B. The facts fail to support a finding that the defendant purposefully directed his activities to residents of Utah or that the instant litigation arises out of defendant's contacts to Utah.

C. Melvin never conducted business in Utah or any other activities that would allow him to invoke the protections or benefits of the Utah courts.

D. Melvin's employment contract does not form the basis for plaintiff's personal jurisdiction claim as there is no nexus between it and defendant's activities in Utah.

E. Plaintiff failed to meet its burden to establish personal jurisdiction when its general allegations of jurisdiction were countered by defendant's sworn affidavit countering those general allegations and plaintiff failed to provide anything more.

F. On the present facts subjecting the defendant to personal jurisdiction in Utah would offend traditional concepts of fair play and substantial justice.

G. To find Melvin subject to the jurisdiction of the Utah courts would make the litigation so gravely difficult and inconvenient for him that he would be severely disadvantaged and denied due process.

H. The remedial purposes of the long arm statute would not be promoted by finding that personal jurisdiction exists in the instant case.

II. Subject Matter Jurisdiction.

A. Plaintiff was not the "real party in interest" pursuant to Rule 17(a) U.R.C.P., nor did privity exist between the plaintiff and defendant and thus the trial court lacked subject matter jurisdiction.

B. Parents corporations and their subsidiaries are separate and distinct legal entities, each with their own bound by their individual obligations and benefits.

C. The "Consent to be Bound" was a document of dubious probative value, if any, that could not cure plaintiff's defective complaint.

D. Where the plaintiff's status as "real party in interest" depends upon an assignment, plaintiff has the burden of proving its status as an assignee, which plaintiff failed to do in this case.

E. Plaintiff had the further burden of proving that the defendant had received adequate legal notice of the assignment which it failed to do.

F. Plaintiff chose this dubious course of action to maintain its status as first in the race to the courthouse and its actions should not be condoned by this Court.

G. Allowing such actions as those taken by the plaintiff would make it possible for a subsidiary of any giant corporation to sue an employee of the parent company in a locale inconvenient to the employee, but convenient to the subsidiary, on issues related to the employment issues between the parent and the employee even though the subsidiary has no relationship to the employee.

III. Mechanical Adoption.

A. The record supports a finding that the trial court mechanically adopted the findings of fact and conclusions of law prepared and presented by counsel for the plaintiff, as the court's Orders exactly mirror those submitted by plaintiff.

B. The court ruled from the bench on suggestion of plaintiff's counsel, even though it had demonstrated its lack of knowledge regarding at least one of the issues and had been misinformed by plaintiff's counsel, and then at plaintiff's counsel's suggestion agreed to his preparation of the court's Orders.

C. The court signed a ruling that was manifestly incorrect.

D. There is nothing in the record that indicates the indicia normally accepted by this Court that the trial court adequately, disinterestedly or independently considered the merits of the case.

IV. Insufficient Findings of Fact to Support Conclusions of Law.

A. The declarations adjudged by the court in the Declaratory Judgment Order are beyond the scope and not supported by the findings of fact set forth in the trial court's Summary Judgment Order.

B. To allow the trial court to impose speculation on the adjudicatory process violates the basic premises of our judicial system and denies at least one side the fair and impartial hearing and adjudication of his affairs to which is his right.

ARGUMENTS

I. Personal Jurisdiction.

Plaintiff has previously conceded that defendant's contacts do not support a finding of general personal jurisdiction. Moreover, of the three bases for finding specific personal jurisdiction under the long arm statute, plaintiff relies only on the allegation that Melvin transacted business in Utah. Its has never argued that Melvin contracted to supply goods and services in Utah or that he cause injury within the state. (See plaintiff's Memorandum in Opposition to Motion to Dismiss.) Under the facts presented in this case, Melvin did not transact business in Utah as defined by the long arm statute and lacked sufficient minimum contacts to support jurisdiction under the Fourteenth Amendment's guarantee of due process of law. The Supreme Court of Utah has recognized that process served pursuant to a long arm statute is not valid or effective to subject a non-resident to *in personam* jurisdiction unless the defendant unless the defendant "purposefully established minimum contact with the

forum state" and the defendant "should reasonably anticipate being haled into court there." *Bradford v. Nagle,* 763 P.2d 791, 794 (Utah 1988).

The Utah Courts have taken the position that if the set of circumstances satisfies Fourteenth Amendment due process constitutional muster, and does not violate its requirements of "fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign," *Shaffer v. Heitner,* 433 U.S. 186, 218 (1977) or "notions of fair play and substantial justice," *International Shoe V. Washington,* 326 U.S. 310, 317 (1945) then the requirements of the long arm statute are also satisfied so long as the claims against the nonresident defendant arise from activities enumerated in Utah's long arm statute. *Kandar v. LaRay Company,* 815 P.2d 245 (Utah App. 1991). Here the plaintiff's assertion of personal jurisdiction fails on several grounds.

"Where a forum seeks to assert specific jurisdiction over an out-of-state resident who has not consented to suit there, this fair warning requirement is satisfied if the defendant "purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that "arise out of or related to" those activities. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472 (1985); *Accord, Synergetics v. Marathon Ranching Co.,* 701 P.2d 1106, 1100 (Utah 1985) (did the defendant purposefully avail himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws?)

There is no allegation nor can one be supported that Melvin *directed his activities to Utah residents.* In fact, his contract, specifically engages him to direct his activities to clients and potential clients in the Eastern Region of the U.S. On the one occasion

that he admits to offering assistance in Utah, his actions were directed by his employer FCC to assist its own sales force in Utah and were not intentional actions undertaken by the defendant. Further, the client solicited by FCC, not Melvin, in the one Utah visit, was not either a Utah nor U.S. firm. Further, regardless of the outcome of the GEC visit, Melvin would not have had any recourse to the courts of Utah, in fact, he would not have had any legal recourse at all. FCC was the host and instigating party. Any contract would have occurred between FCC and GEC. Thus plaintiff has alleged nothing to show that defendant either purposefully availed himself of the privilege of conducting business in Utah or conducting such activities that would allow him to invoke the protections and benefits of the Utah courts.

"The minimum contacts standard is not susceptible of mechanical application and, instead, involved an ad hoc analysis of the facts. . . . the number of contacts has no talismanic significance but that the quality of the contacts as demonstrating purposeful availment is the issue." *Rocky Mountain Claim Staking v. Frandsen,* 884 P.2d 1299, 1301 (Utah App. 1994), and cases cited therein. It should be noted that on none of the defendant's trips to Utah did he make any sales, receive or place any order; or otherwise conduct the activities he was hired to conduct for the Eastern region. If the plaintiff's contention is that it can establish *in personam* jurisdiction in its home state by requiring attendance of his employees at meetings and conferences, the logical conclusion to this argument would be that an employer could force an individual employee to travel 2000 miles to maintain his job and the require him to defend himself in local court against a declaratory judgment. By imposing the

additional burdens and costs the plaintiff could automatically provide itself with an unfair advantage which is exactly what it is attempting to do.

"An individual's contract with an out-of-state party cannot alone automatically establish sufficient minimum contracts in the other party's home forum. Instead the prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing, must be evaluated to determine whether the defendant purposefully established minimum contacts." *Burger King* at pages 478-9. Neither contract signed by Melvin was *negotiated, drafted or signed* by Melvin in Utah. *See Synergetics, supra* ; therefore, the existence of the contract does not pass the requisite purposeful activity nor minimal contacts. The contract signed by Melvin and FCC, which incidentally has no choice of law or venue provision, specifically limited his responsibilities to clients in the Eastern Region of the U.S. not Utah. (If the defendant had solicited Utah customers even if he had never entered the state, plaintiff might prevail), *see Neways v. McCauland*, 950 P.2d 420 (Utah 1997). But he never did and the plaintiff has failed to show that he did.

"To exercise jurisdiction consistent with due process, the non resident defendant must have "minimum contact with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe at page 316.* "These minimum contacts must be the basis of plaintiff s claim." *Synergistics at page 1110. Arguello v. Industrial Woodworking Machine Co.,* 838 P. 2d 1120, 1123 (Utah, 1992). The U.S. Supreme Court has suggested two modes for analyzing whether minimum contact are present: the

"arising out of" test and the "stream of commerce test." *Hansen v. Deckla* 357 U.S. 235, 250-4, rehearing denied, 358 U.S. 858 (1958); *see also Arguello, supra* and cases cited therein. Plaintiff has never advanced the stream of commerce argument nor does it apply, leaving the arising out of test. Plaintiff's complaint sought declaratory relief in Utah from a demand letter and potential complaint sent to defendant's employer for (according to plaintiff) "compensation for potential future sales to prospective customers and entitlement to commissions or seminars after the date of his *resignation* (sic)." Plaintiff was asking the Utah court to grant it protection from defendant's claims for income due him for his work in the Eastern Region with clients located within his region. It should be noted that none of the customers listed in the draft complaint are Utah corporations. Specific personal jurisdiction "may be asserted . . . only on claims arising out of defendant's forum state activity." *Neways, Inc. v. McCausaland*, 950 P.2d 420, 423 (Utah 1997). Here there is no connection between the relief sought and defendant's contacts with Utah. All of the actions taken by Melvin regarding the relief he sought took place in and around the state of Maryland and were directed at clients and potential clients located there. These sales did not "arise out of" any trips he took to Utah, nor do the trips to Utah, with the exception of the one day spent consulting for free to FCC personnel for a non Utah company, have any reasonable connection to the relief sought. "Generally, the more closely related the contacts are to the cause of action for which jurisdiction is taken, the fewer contacts are necessary to establish jurisdiction." *Rocky Mountain Claim Staking v. William*, 884 P.2 1299, 1301-2 (Utah App. 1994), conversely where the

nexus between the contacts and the cause of action is non existent, one allegation that defendant once, at his employer's insistence, provided assistance in Utah to Utah based sales staff, is hardly sufficient to support the plaintiff's allegation of *in personam* jurisdiction.

In *Roskelley v. Lerco, Inc.*, 610 P.2d 1307, 1310 (Utah 1980), the Court noted, "Where jurisdiction is challenged, plaintiff cannot solely rely on allegation of jurisdiction in the face of an affidavit by defendant which specifically contradicts those general allegations." Melvin notes that the plaintiff has intentionally declined to support its allegations with any declarations or affidavits. The *Roskelly* Court had before it, as this court does, the mere allegation by the plaintiff in its complaint that the defendant "worked and performed services in Utah and solicited customers in the State of Utah." The defendant answered this allegation in a sworn affidavit alleging material and specific facts that contradicted the allegation of jurisdiction. Absent something more from the plaintiff (which was not present in that case or this), the court dismissed due to lack of personal jurisdiction.

The instant case is similar to *Bradford, supra* in which the court found insufficient contacts with the State of Mississippi for a judgment against Utah residents. In that case the Mississippi resident initiated the negotiations for sale of Utah property, and personally inspected the property in Utah. The contract for sale was to be performed entirely in Utah and partial payment was made in Mississippi. Similarly, the employment letter signed by Melvin and FCC was executed by Melvin in Maryland. The agreement does not indicate which state's courts would have

jurisdiction should a conflict arise. Melvin never knowingly, intentionally or unintentionally, subjected himself to the jurisdiction of the Utah courts. His activities in Utah were of short duration and did not involve the exercise of the duties he was hired to perform. He maintained no connections to Utah or continuing relationships or obligations to Utah residents, outside of the fact that he was employed by a corporation that did business throughout the world but had its home office in Utah.

The Court in *Bradford* found that to subject the defendant to *in personam* jurisdiction on the facts would offend "the traditional conception of fair play and substantial justice." 763 P.2d at 795.

Even where a court has found that a defendant had established the necessary minimal contact with the forum state, "these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." Thus courts may appropriately evaluate the "burden on the defendant" against "the forum State's interest in adjudicating the dispute." "As we have previously noted, jurisdictional rules may not be employed in such a way as to make litigation so gravely difficult and inconvenient that a party is unfairly at a severe disadvantage to his opponent." *Burger King* at page 478. *Accord, Roskelley, supra.* Even if the plaintiff had met its burden in establishing a factual foundation for *in personam* jurisdiction in Utah, which it has not, there is no question that requiring the defendant, an individual who was unemployed for a significant period of time due to actions of his Utah employer, with no ties, resources or contacts in Utah, to defend an action 2000 miles from his home requiring untold

expense in obtaining legal assistance, witnesses, travel expenses and all of the related costs attendant in defending himself against a multi million dollar, multi national corporation with huge resources at its disposal and representation in Maryland, who would suffer no hardship from having this case heard in Maryland, effectively denies the defendant his right to have his grievance redressed, his day in court and his right to due process of law.

While the instant claim may "arise out of" Melvin's employment contract, it does not arise out of any activities of his in Utah. In *Viacom v. Melvin Simon Productions,* 774 F. Supp. 858 (S.D.N.Y.) the court adopted the same reasoning in a case involving the request for a declaratory judgment. Quoting *Columbia Pictures Industries, Inc. v. Schneider*, 435 F. Supp 742-749-50 (S.D.N.Y. 1977), *aff'd* 573 F.2d 1288 (2nd Cir. 1978), the court stated that the plaintiff (like FCCS) was "merely seek[ing] a declaratory judgment that it did not injure the nondomiciliary defendants. It is difficult to understand in what way a cause of action for a declaration that plaintiff did not injure defendants 'may fairly be said to have arisen' out of defendant's transaction of business in the state . . . The remedial purposes of the long arm statute would not be promoted by a finding that personal jurisdiction exists here; indeed, where no injury to the plaintiff is claimed, it seems more likely that the state courts would adhere to . . ." a more restrictive view where the plaintiff claims no injury at all from the defendant's business transactions in the state. 774 F. Supp. At 863.

V. Subject Matter Jurisdiction.

All of the documents introduced in this case clearly indicated that defendant's employment relationship was with FCC not FCCS. In fact, it wasn't until several months after he was fired that he received a W-2 form from FCCS thereby learning of its identity for the first time. Defendant argued to the trial court that it had no evidence before it that FCCS was the "real party in interest" pursuant to Rule 17(a) U.R.C.P. and that no privity existed between it and the defendant. Further, that corporations and their subsidiaries, unlike corporate divisions, are separate entities each with its own rights and obligations. "When a corporation sues or is sued in its corporate name, the action is by or against the corporation itself as a legal entity." *19 Am Jur 2d §2173.* "Generally service of process on a subsidiary is not valid as service upon a parent corporation, nor is service on the parent valid as to the subsidiary." *19 Am Jur 2d §2193.* In other words, under general principles of corporate law, parents and subsidiaries are separate and distinct entities and cannot sue or be sued on behalf of each other except in very specialized circumstances. Utah law is in accord.

"A corporation, be it parent or subsidiary, has its own legal identity and existence. Common ownership or control does not automatically destroy that separate identity. Although in appropriate cases equity may look through the corporate shell to its alter ego to prevent fraud or wrongdoing, the general rule still applies that corporations are separate legal entities bound by the obligations as well as the benefits." *Institutional Laundry v. Utah State Tax Commission,* 706 P.2d 1066, 1067 (Utah, 1985), *citing Surgical Supply Center v. Industrial Commission of Utah, Dept. of Employment Security,* 223 P. 2d 593, 595 (Utah, 1950). FCC and FCCS are separate legal

entities, each bound by its own obligations and benefits. Therefore, it was totally inappropriate for FCCS to attempt to obtain judgment against the defendant on behalf of FCC without joining FCC. Even more to the point, "[I]n this situation the consideration of justice, which so requires is simply that a controlling corporation, such as Omnico, should not be permitted to manage and operate a business from which it stands to gain whatever profit may be made, have the advantage of the efforts of those who serve it, and then use nomenclature of another corporation as a facade to insulate it from responsibility for paying for such services." *(emphasis added)* *Chatterly v. Omnico*, 485 P.2d 667, 670 (Utah, 1971). The relationship between the plaintiff and FCC, that FCCS was a wholly owned subsidiary of FCC was a mystery to the defendant when this suit against him was instituted. The defendant only learned some time after this suit against him was instituted against him and even then all he learned was that FCCS was a wholly owned subsidiary of FCC, not that FCCS had any relationship to the defendant. Both letters of agreement signed by the defendant were with FCC, FCC was his sponsor with INS. As his personnel file supports, all of his written communications were with FCC.

Whatever the relationship between FCC and FCCS, the fact remains that the FCC operated a business which employed the defendant, had the advantage of the defendant's efforts on its behalf, and made money from his efforts. It is a misuse of the powers of the Utah judicial system to ask it to sanction an attempt by FCCS and FCC to evade FCC's legal responsibilities and obligations. "There is no doubt about the correctness of the proposition urged by the defendant that a party should not be

permitted to use corporations of similar names to engage in a now you see it now you don't legerdemain and thus trick or cheat another." *Centurian Corp. v. Fiberchem, Inc.*, 562 P.2d 1252, 1253 (Utah, 1977.) This is exactly what the plaintiff, FCCS, and its counsel have attempted to do. By the artful use of the nomenclature "Franklin Covey" (in its pleadings without identifying which corporation it means), it has attempted to obscure the legal distinction between the separate legal entities FCCS and FCC in order to evade FCC's responsibilities and deny the defendant his day in court. However, this "artful pleading" should not be sanctioned by this Court particularly in light of the fact that FCC has now admitted under oath through a lawful, clearly designated representative, that it and FCCS are separate companies. (See Attachment B, defendant's Motion for Relief from Judgment or Order, "Verified Answer of Franklin Covey Co. filed in the case of Bay v. FCC, Superior Court, Orange County, California I. 502-22)

It should be noted that plaintiff, FCCS, chose both the forum and the parties. When privity was raised rather than amending its complaint to include FCC, as permitted by the Utah Rules, it originally attempted to ignore the issue by obfuscation and finally chose to submit a dubious document entitled "Consent to be Bound," which is notable for its originality but not its probative value. "If, as here, plaintiff's status as a real party in interest depends upon an assignment from the original real party in interest, it is necessary for the plaintiff to prove, in addition to the basic elements of its case, its status as an assignee." *Alpine Associate, Inc. v. KPER Inc.*, 802 P.2d 1119, 1121 (Colo. App. 1990). By its own admission, argued by plaintiff to the

court after Declaratory Judgment had been ordered, in its response to defendant's Motion for Relief from the Court's Order, the "Consent to be Bound" "was not an actual assignment but merely notice to the court that an assignment" (which had never been submitted to the court before it made its Declaratory Judgment ruling) "had occurred," thereby leaving the court with no proof on which to base its decision. This was not sufficient to meet the plaintiff's burden, *see Alpine, supra.* In accord, *Delta Traffic Service, Inc. v. Sysco Intermountain Food Services,* 944 F.2d 911, (10th Cir. 1991), "the burden of proving an assignment is upon him who claims thereunder." Under this rationale, the court had no evidence of the assignment, hence no valid basis on which to rule that the plaintiff was the real party in interest and thus, that subject matter jurisdiction existed.

"Rule 17 seeks to protect the interests of judicial economy and fairness to the parties in litigation." *Anderson v. Reynolds*, 841 P.2d 742, 744 (footnote 3) (Utah App. 1992). Despite plaintiff's contentions to the contrary, the dubious assignment, Attachment F to plaintiff's Memorandum in Opposition to Melvin's Motion for Relief from Judgment or Order, was, as the record clearly reflects, the first time defendant had ever seen or had notice of the existence of the said document. This purported assignment was undated, thereby providing no clue to when it was signed, and not under oath, thereby further undermining any probative value that it might have had.

In response plaintiff cites *Lynch v. MacDonald*, 367 P.2d 464 (Utah 1962) in which the court held that an assignee is the real party in interest. However, in that

case, unlike this one, a close reading suggests that the court had actual evidence before it about the assignment, on which to base its decision. Plaintiff also attempts to avoid the issue of notice by alleging that notice was provided by the 1997 W-2 (provided to the defendant several months after he was fired) and that defendant had notice of the undated assignment which surfaced for the first time in post trial motions filed by plaintiff in October, 1998). "The burden of proof and of ultimate persuasion of all the essentials of its cause of action was upon the plaintiff." *Peoples Finance and Thrift Co. v. Landes,* 503 P.2d 444, 445-6 (Utah 1972), including footnote 3, "plaintiff has the burden of proving that the obligor had notice of an assignment," *see Pillbury Inv. Co. v. Otto,* 65 N.W. 2d 913 (Minn. 1954). Accord, *Bank of Salt Lake v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints,* 534 P.2d 887(Utah 1975). Since the plaintiff failed to meet its burden of proving that an effective assignment had occurred allowing it to pursue this case as a real party at interest, and as it further chose not to amend its complaint to include the real party in interest, FCC, the trial court lacked subject matter jurisdiction and should have dismissed the case.

In *4447 Associates v. First Security Financial,* 889 P.2d 467 (Utah App. 1995) the court noted: "Because 4447 Associates would materially benefit from a favorable determination of its rights as an assignee seeking to enforce an assignment (as FCCS would in this case), it bore the burden of proving First Security received notice of the assignment." 889 P.2d at 470. The court then found that adequate legal notice had not been received. 889 P.2d at 473. In the instant case, Judge Young made no

finding of fact regarding this issue, unless one considers footnote 2 of the Declaratory Judgment order which states, "[H]owever, the Court finds it is immaterial whether Melvin was employed by FCCS or FCC. This action concerns only one employee, one employer, and one employment relationship." This was news to the defendant who knew of the existence of himself as the employee, FCC as his employer and his employment relationship with FCC not FCCS. The *4447* court went on to state that the standard of review concerning whether or not a party had notice of a particular occurrence was a finding of fact, which it would review under the clearly erroneous standard, however, determination concerning the effect of notice presented a question of law which was reviewed for correctness. 889 P.2d 471. At a minimum this "finding" by Judge Young does not address whether or not defendant received adequate notice, it merely declared the need for notice irrelevant, and, it is submitted, is clearly erroneous. Moreover, the effect of the so called notice, "the Consent to be Bound" definitely prejudiced the defendant's rights and under the standard of review set forth in *4447 Associates*, this Court should declare the action a nullity.

The question remains why the plaintiff chose the course of action it did rather than simply amend its complaint. The plaintiff's contention that the result of this case would be the same regardless of which company is the defendant's employer is untrue. Had the plaintiff acted appropriately and amended its complaint rather than create an end run around the Rules of Civil Procedure, he would have lost his favored spot in the race to the courthouse and a very different outcome would have likely

occurred in the case latter filed by defendant in Maryland. Also while Judge Young studiously failed to address this issue despite the facts and overwhelming case law presented to him, it is quite possible that another court would be less accommodating and more likely to require a stricter adherence to the Rules of Civil Procedure.

Finally, a ruling by this Court on this issue is also of significant importance to the administration of justice because of its potential impact on the issues of Rule 17(a) status, privity and subject matter jurisdiction as well as those of judicial economy and fairness to parties in a lawsuit and the limits to which this Court will allow their use or abuse. The defendant, an individual who is a resident of Maryland, was sued in Utah state court by a Utah corporation (unknown to him before he was served with a summons) purporting to represent his former employer after the defendant sent that employer a demand letter having failed in obtaining relief through informal negotiations. Both the former employer and the plaintiff are multi national corporations with significant resources. Both do business in and would be subject to the jurisdiction of the Maryland courts. Melvin's ties to Utah are extremely tenuous at best. Only through a tortured reading of §78-27-24(1) Utah Code Ann. (as noted, it has been conceded that this is the only possible provision of §78-27-24 that has any applicability) could a trial court allow this case to proceed rather than either requiring the plaintiff to amend its complaint or dismissing it for lack of subject matter jurisdiction. Determining the limits of §78-27-24(1) Utah Code Ann. is an important issue for this Court's consideration. Otherwise, it would be possible for subsidiary of any giant corporation like General Motors or Time-Warner to sue any employee of its

parent company in any locale where that subsidiary does business no matter how lacking or remote the connection is between the subsidiary and the employee, e.g. Hughes Aircraft, a wholly owned subsidiary of General Motors, could sue an automotive assembly line worker employed in Detroit by GM over the terms of that worker's employment contract with GM and file that suit in the state of Connecticut where Hughes does business, although the employee's only contact may have been to drive through the state once or twice on his way to some other destination. This could hardly be the intent of the drafters of the Utah Rules of Civil Procedure.

III. Mechanical Adoption.

The record supports a finding that the trial court mechanically adopted the findings of fact and conclusions of law prepared and presented by counsel for the plaintiff[7]. The trial court's findings mirror exactly the proposed findings propounded by the plaintiff. The transcript from the hearing made clear that the trial court was confused as to Melvin's ties to Utah. Counsel for the plaintiff incorrectly informed the court that Melvin "conducted business here by attempting to recruit clients and he is seeking compensation (sic) that very activity, and that, therefore, specific person jurisdiction does exist. But it may be wise to make a ruling on that motion." At which point the trial court ruled that it had personal jurisdiction, the only pronouncement that came from the trial court, and was based on misinformation which the court would have discovered if it had merely read defendant's submissions. The rest of the alleged findings of fact were the work product of plaintiff's counsel.

This is obvious from the fact that the trial court extended its ruling to cover Maryland though Maryland law was not briefed for it nor it is clear it had the jurisdiction to do so. (The judge thus signing an Order that was manifestly incorrect.) The court also never addressed the Rule 17(a) issue, although as demonstrated by plaintiff's counsel, defendant raised it at least 11 time. Instead the court adopted in its Declaratory Judgment Order the reasoning and wording of plaintiff's counsel, that the argument was immaterial because there was "only one employee, one employer and only one employment relationship."

There is nothing in the record of this case that indicates the indicia normally accepted by the Appellate Courts in Utah that the trial court adequately deliberated or considered the merits of the case. *Automactic Control Products, Corp. v. Tel-Tech, Inc.* 780 P.2d 1258 (Utah 1989) The indicia in *Automactic Control* was that the trial judge took the case under advisement, allowed both parties to submit memoranda, and later requested from both parties proposed findings of fact and conclusions of law. In the instant case Judge Young, after unaccountably refusing to allow the defendant to participate by telephone in the hearing, announced his ruling from the bench and then agreed with plaintiff's counsel's request that he prepare the Orders. Defendant was only given notice of these proposed Order because the Utah rules required plaintiff's counsel to do so. Otherwise he would have been shut out completely. *The Boyer Company v. Lignell*, 567 P. 2d 1112 (Utah 1977) in which the indicia included the fact that while the trial court asked the prevailing party to draft finding, the losing

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[7] For this Court's convenience the plaintiff's proposed Orders have been included in

party was permitted to file objections and proposed amendments which were argued before the trial court. In the instant case defendant's objections were ignored by the trial court. Accord, *Alta Industries, Ltd. v. Hurst*, 846 P. 2d 1282 (Utah 1993). *State v. James*, 858 P.2d 1012 (Utah App. 1993), the findings were sufficiently detailed to allow the appellate court to review the trial court's decision. The findings is this case are meager at best.

IV. Insufficient Findings of Fact to Support Conclusions of Law.

The trial court's findings of fact are insufficient to support its conclusions of law. The declarations adjudged by the court in the Declaratory Judgment Order are beyond the scope of the facts found by the court in the Summary Judgment Order, and are not supported by the record. In its Summary Judgment Order the court found the following: "The Defendant's Motion(s) to Dismiss are hereby DENIED." (The only supporting item was a footnote in which the Court stated it found both Motions asserting lack of personal jurisdiction *unmeritorious*.) and "[T]here are no genuine issues of material fact and plaintiff is entitled to judgment as a matter of law." There were no further findings. Yet in its Declaratory Judgment Order the court declared the following: "(1) Franklin Covey has no contractual, implied or other obligation to pay Defendant Melvin commissions or any other compensation related to seminars held or future seminars scheduled to be held or products sold subsequent to the September 12, 1997 effective date of Defendant Melvin's separation from Franklin Covey; (2) the Release signed by Defendant Melvin on

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the Addendum as Attachments D and E.

November 13, 1997 bars all claims related to payment of compensation or commissions for services performed by Melvin during his employment with Franklin; and (3) Franklin's policy and practice with respect to the payment of commissions to separated Account Executives is not violative of law." In a footnote, the court held found that the "declaratory relief herein is required under both Utah and Maryland law." The court is therefore not required to determine which law applies to this dispute." While admittedly giving the plaintiff all the relief it could dream of and more, unfortunately, the court failed to consider the record before it and whether or not its findings were support by that record.

In fact, the court committed several errors of law. "Rule 60(b)(1) provides a trial court may relieve a party of a judgment in a case of . . . mistake of law by the trial court." *Bischel v. Merritt*, 905 P.2d 275, 277 (Utah App. 1995). "Conclusions of law must be predicated upon and find support in the findings of facts and the judgment or decree must follow the conclusions of law. Where there is variance the judgement must be corrected to conform to the findings." *Gillmor, supra* at page 436.

Except for one Maryland case cited by the plaintiff in its original Memorandum in Support of Motion for Summary Judgment, which dealt with a general legal principle regarding contract interpretation, under a legal theory that was disputed by the defendant, neither side briefed nor presented any arguments to the trial court citing Maryland law. While the Declaratory Judgment making the court's Order applicable under Maryland law (and thus presumably attempting to foreclose future action in the Maryland courts), may demonstrate the value of Rule 5(b)(2)

U.R.C.P. to a prevailing party (particularly one in a sympathetic forum), this alone cannot possibly justify the overreaching that this declaration demonstrates.

In its response to plaintiff's Motion for Summary Judgment, defendant raised the following affirmative defenses: (1) there was no express agreement between the parties; (2) the terms of the April 9, 1997 letter are ambiguous and thus do not preclude an unjust enrichment cause of action; (3) that defendant's consent to the April 9, 1997 agreement was produced by duress; (4) that there was a lack of a meeting of the minds regarding the April 9, 1997 letter thus no agreement was formed; (5) that FCCS and/or the real party in interest, Franklin Covey Co. breached its implied covenant of good of good faith and fair dealing. The trial court in its meager Summary Judgment findings failed to address any of these issues . "Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Crowther v. Mower*, 876 P.2d 876, 878 (Utah App. 1994). Since the court failed to address any of these legitimate issues raised by the defendant in its findings, it is impossible to determine how these impacted the findings that were made, or if they were considered at all. In its Opposition to Summary Judgment, the defendant had further argued to the court that summary judgment was inappropriate at that juncture because there were clear factual issues in controversy and that information developed through discovery would aid this court in determining what, if any issues, were appropriate for summary determination, and what issues should remain for the trier of fact. "When a motion is made opposing summary judgment on the ground discovery has not been completed,

the court should grant a continuance or deny the motion for summary judgment." *Auerback v. Kimball*, 572 P.2d 376, 377 (Utah 1977). *See also American Towers supra* at page 11 (Utah 1996).

PRAYER FOR RELIEF

Article I, Section 7, of the Utah Constitution states that "[N]o person shall be deprived of life, liberty or property without due process of law." The overreaching and misuse of the Courts of Utah in this case by the plaintiff in its efforts to deny the defendant even the appearance of due process cries out for redress.

1. It is respectfully requested that this Court enter an Order dismissing the instant action for lack of jurisdiction or in the alternative remand this matter to the trial court with instructions to enter the appropriate judgment of dismissal in favor of the defendant.
2. It is further respectfully requested that this Court enter an Order awarding costs and attorney's fees to the defendant or in the alternative remand this matter to the trial court with instructions to enter the appropriate judgment for costs and attorney's fees.

For all of the reason stated above, the judgement of the trial court must be dismissed or remanded with to the trial court with instructions to enter the appropriate judgment of dismissal in favor of the defendant.

Respectfully submitted,

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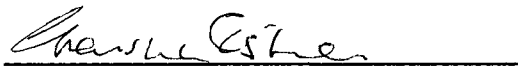
CERTIFICATE OF SERVICE

I hereby certify that on July 16, 1999, I have served two copies of the Brief for the Appellant upon counsel for the Appellee, Steven Bednar, Manning Curtis Bradshaw and Bednar LLC, Newhouse Building, 3rd Floor, 10 Exchange Place, Salt Lake City, Utah 84111 by first class mail, postage prepaid.



Marsha A. Ostrer, Esq.

ADDENDUM

ATTACHMENT A

IN THE SUPREME COURT OF THE STATE OF UTAH

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Franklin Covey Client Sales, Inc., a Utah corporation,
Plaintiff and Appellee,

v.

David Melvin, an individual,
Defendant and Appellant.

No. 981850

ORDER

The court defers ruling on plaintiff's motion for summary disposition until plenary hearing on the matter. The parties are asked to include the jurisdictional issue in their briefs. Rule 10(d) of the Utah Rules of Appellate Procedure is suspended; the parties should proceed to the next stage of the appellate process.

BY THE COURT:

Date Feb. 8, 1999

Richard C. Howe
Chief Justice

ATTACHMENT B

DECLARATION OF DAVID MELVIN

1. My name is David Melvin. I am a citizen of the United Kingdom and a resident of the State of Maryland. I know the facts stated in this declaration from personal knowledge. I am over 18 years of age and am competent to testify to the matters contained in this declaration.

2. I have received permanent work authorization from the U.S. Immigration and Naturalization Service (hereinafter INS) to work in the U.S. I am married to a U.S. citizen who is a resident of Maryland and has been so for at least the last 15 years. My wife has two children who reside with us whom I plan to adopt.

3. I was employed by Franklin Covey Company for a period of 5 years and 9 months. For 3 years and 6 months I worked for the company in the U.K. as Manager of Business Operations. My duties included:

a. Developing new business in the United Kingdom and Europe as an account executive.
b. Maintaining existing customer accounts.
c. Presenting time and project management workshops to our customers.
d. Developing, implementing and overseeing business and employee policies and procedures.
e. Supervising and managing 18 employees and managing a $3.5 million business.

4. In 1995 I applied for an intra-company transfer to the Shipley Division of Franklin Covey in the U.S. as I had become engaged to my current wife. I commenced work with Shipley Associates on July 5, 1995. My place of employment then, and at all times I was employed by Franklin Covey, was located at 200 Orchard Ridge Drive, Suite 210, Gaithersburg, Maryland 20878. When I first came to the U.S., Franklin Covey, was known as Franklin Quest Co.. Franklin Covey sponsored my application for immigration papers with the INS. In that application Franklin Covey acknowledged that I would be based in the Gaithersburg Office.

5. I was employed by Franklin Covey in the U.S. between July 1995 and September 1997. During that time I was given responsibility for sales in the Central Atlantic States in the Eastern Region. This territory was composed of New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia and the District of Columbia. In addition to me, there were five other employees in the Gaithersburg office. These included two administrative assistants, Ann Coulis and Christine Smith, and three other account executives, Bob Cuneus, Frank Howard and Matt King. For the first year, my direct supervisor was Brad Douglas who was located in Utah and later my supervisor was Matt King who at all relevant times resided in Gaithersburg, Maryland. My duties for the Eastern Region were as follows: Strategic Business Communications Account Manager

in the Eastern United States and Europe selling writing and presentation training and consulting services.

6. I have never resided in the State of Utah. I have no bank account or other financial ties of any kind to Utah. I own no property in Utah, pay no taxes and have no other connection to the state other than that I was employed by Franklin Covey. I have visited the State of Utah 10 times at the request of Franklin Covey. The dates of these visits and their purposes are as follows:

April 20, 1992	10 days	Induction training
October 12, 1992	4 days	Conference
July 2, 1993	4 days	Conference
June 22, 1994	4 days	Conference
January 2, 1995	2 days	Job interviews
August 21, 1995	4 days	Conference
January 2, 1996	4 days	Conference
September 11, 1996	3 days	Sales retreat
November 25, 1996	2 days	Program training
May 30, 1997	1 day	Meeting with GEC U.K.

7. Most of these were meetings for sales representatives from around the world whom Franklin Covey invited to Salt Lake City for meetings. While in Utah I conducted no business other than that related to the meetings I attended. I have no clients who are based in Utah. The only exception to the above was a meeting I attended in May of 1997 for the purpose of assisting Franklin Covey in understanding the needs of an existing U.K. client, known as GEC. Since I knew GEC when I worked in the U.K., I was asked by Franklin to help Franklin's sales staff in Utah understand GEC's needs. Franklin Covey requested that I attend. I did not attempt to sell products or services to GEC in Utah. I did not receive any compensation for this trip (although my only compensation at that time was a straight commission) and no sale resulted in Utah at the time. I understand that later sales took place in the U.K.. The only other time I was scheduled to attend a business meeting in Utah was on August 20, 1997 when I was about to board an airplane to Utah, but was fired by telephone at the airport. It was never my intention to subject myself to the laws of Utah nor to seek the protection of Utah law.

8. All acts pertinent to this complaint occurred in and around the State of Maryland. (All of the states in my territory border Maryland, except for New Jersey, which is separated from Maryland by less then 20 miles.) I have signed no contractual document with Franklin Covey or any related entity agreeing to the application of the laws of the State of Utah in any case or controversy relating to my employment.

9. Should this case go to trial, the following categories of witnesses are likely to testify:

a. Employees of Franklin Covey located in and around Maryland. To the best of my knowledge Franklin Covey employs 10 account executives and 10 training consultants residing in and around the Maryland area for the Eastern Region.

b. Former employees of Franklin Covey. To the best of my knowledge there are approximately six former Franklin Covey employees with knowledge of matters pertinent hereto and who live in and around the Maryland area.

c. Former clients of mine who purchased and/or continue to purchase services and products from Franklin Covey. See attached Exhibit A. The breakdown for these companies is as follows:

10 in Maryland
14 in Virginia
1 in West Virginia
5 in DC
1 in Delaware
20 in Pennsylvania
20 in New Jersey
1 in New York
3 in Europe

10. Except for the European clients, all of the clients are within a few hours drive of Maryland. The costs of obtaining willing witnesses to testify would be much greater if this matter is heard in Utah.

11. Most of the sources of proof are in Maryland. I conducted business (when not visiting clients on site) either at the Gaithersburg office or at my home in Silver Spring, Maryland. Additionally, Franklin Covey does considerable business in the State of Maryland. Franklin Covey also maintains a client contact management system which record all client contacts. This system, is available from any computer with a modem.

12. Until 1998, when I received my W-2 form for 1997 and was served with the summons in this case, I had no idea that I might have been working for Franklin Covey Client Sales, Inc. since none of my employment related documents used that name.

13. The sponsoring organization on my INS application was originally Franklin Quest Company and later Franklin Covey Consulting Group. Based on documents in my possession and personnel documents previously requested by me from Franklin Covey, at no time did I enter into any relationship, contractual or otherwise, with Franklin Covey Client Sales, Inc.

14. Franklin Covey operates a retail store that sells supplies and other Franklin

materials in Towson, Maryland and has operated this store during the entire period of time I worked for Franklin Covey in America. Additional retail stores are operated in New Jersey, Pennsylvania, Virginia and the District of Columbia.

15. On or about February 5, 1998, my Maryland attorney sent a negotiation letter to Franklin Covey Co.. A copy of that letter is attached to this declaration (without its own attachments) as Exhibit B.

I declare under penalty of perjury that the foregoing is true and correct.

Date: April 30th 1998

David Melvin

ATTACHMENT C

David Melvin
Supplemental Declaration

1. My name is David Melvin. I am 54 years old. I am a resident of Maryland. I am married to an American citizen who has two children, a 13 year old boy with profound learning disabilities and a 2 year old baby that I am adopting. We have been a family for the past 3 years.

2. I joined Franklin International, Europe, a division of Franklin International Institute, Inc. in Europe in January 1992 as an Account Executive (AE) and training consultant based in the United Kingdom (UK). Between January, 1992 and July,1995 I continued to be employed by Franklin International, Europe in the UK. During that time I was consistently overall number one for productivity. In January, 1995, I applied for a transfer to the United States, where Franklin Quest Co. (when Franklin went public it changed its name to Franklin Quest Co. Franklin Quest Co. is the direct forerunner of Franklin Covey Co.) is incorporated and has its principal place of business. I was offered the position of AE for the Central Atlantic States with a division of Franklin Quest Co. known as Shipley Associates, a Division of Franklin Quest Co.

3. I signed a letter of agreement on May 9, 1995 with Shipley Associates. This letter set forth the terms of my employment. This letter contains no reference to what laws would apply if a conflict arose between my employer and myself nor did it contain any provision regarding timing and payment of commissions for sales of services and goods.

4. I started in work in the U.S. in Maryland in July, 1995. My supervisor at that time was Jeff Call. Mr. Call or someone else from the home office in Utah would often visit the Maryland office. All of my activities were directed at developing business within my territory, the Central Atlantic States. At that time my employer maintained an office at 200 Orchard Ridge Drive, Gaithersburg, Maryland that contained office space for AE's and two administrative assistants. I either worked out of that office or at home where I maintained a separate office business phone line, or traveled to visit clients within the Central Atlantic States (which I did on a regular basis.) Christine Smith, who was the administrative assistant in the Maryland office and is a resident of Maryland (and would testify at trial in Maryland if called) was my primary support and provided administrative and clerical support to my work in the Central Atlantic States. The other administrative assistant, Ann Coulis, also a resident of Maryland, also has knowledge of my activities.

5. It should be noted that at the time that I assumed my actual duties in the U.S., I was informed that my employer had arbitrarily cut back on the territory for which I would be responsible, therefore cutting back my income potential. I estimate the total existing business taken from me at that time to have had a value of at least $300,000 per annum. Despite all of this I achieved a 68% growth in sales from $227K in 1995 to $382K in 1996. This was my first experience with Franklin Covey Co. going back on a promise that they had made to me to their advantage and my disadvantage.

6. I had no formal performance appraisal at the end of fiscal 1995 or 1996 but received warm tributes from my then immediate supervisor, Brad Douglas, in Utah, and the then leader of the division, John Harding for my sales performance, for the skill I applied teaming with other AE's and for working with their clients to improve overall sales for Franklin Quest in 1994. When I inquired about a formal, on the record performance appraisal, Brad Douglas informed me that this did not happen here in the U.S.

7. My team was reorganized at the start of fiscal 1997 into area teams in the division rather than product in different parts of the country. The three product teams were: Strategic Business Communications, (SBC), Business Development Services, (BDS), and Projects. I was part of the SBC group and had line responsibility for the Eastern area. My immediate supervisor was Matt King, who lived and worked in Maryland. At the start of fiscal 1997, I was given a non-negotiable goal of $650 K for fiscal 1997 which represented a 41% increase over fiscal 1996 actual sales. This was the largest increase in my product group even though I had the least tenure. This was my second experience of arbitrary behavior on the part of my employer that benefited the employer and hurt me.

8. In fiscal 1997 I was given little support for the projects part of the business which represented 50% of my goal. This particular part of the business required support from another branch of the business. This project goal was a joint one. The person assigned to me (Steve Hilton) in 1997 was inexperienced and unmotivated. He subsequently left the company but only after he had done our mutual sales goal grave damage. I brought this to the attention of Matt King who agreed but indicated that he was helpless to do anything about it.

9. I raised this issue again with Matt King at our November 1996 strategy meeting,(my over-riding concern was Hilton's availability, he did not respond to voice messages, and was evasive about coming East to work together.). King agreed and said he was having problems supervising him and he thought Hilton was trying to breakaway from his supervision. Again he said he had complained to upper management, but nothing was being done. Matt King became sick at this time and was out of action for the remainder of the 1997 fiscal year. So I was lacking management direct support.

10. Finally, in desperation, I formally brought the problem to the attention of Jeff Shumway, the Vice President responsible for sales for the Eastern Region at our regional conference at the beginning of December 1996 held in Gaithersburg, Maryland, to be told that, whilst it was a problem, we would just have to figure out a way of dealing with it ourselves. (Other AE's applauded me for this stance saying it was long overdue.) The problem was never resolved and Hilton found another job elsewhere in March 1997. By this time all of senior management were being consumed by the merger with Covey and no replacement was made.

11. On April 1, 1997, I went to the office as was my practice. I was expecting to have a meeting with Jeff Butler, a Franklin Quest Co. Vice President who was visiting the Maryland office from Utah. I had been told that the purpose of the meeting was a strategy meeting to discuss third quarter activities and business forecast and had prepared accordingly. I was stunned when informed by Mr. Butler, upon my arrival at

9 a.m. that my position was being eliminated with immediate effect. I was told I was expected to leave the office that week and turn over all files, and, keys and credit cards. I was given a letter (on Franklin Quest Co. letterhead) to sign stating that Franklin Quest Co. would pay me approximately six weeks compensation (pre-tax) in return for waiving any and all legal rights I had in the matter. This was my third experience with arbitrary and capricious behavior on the part of my employer that benefited my employer to my detriment. Needless to say, I refused to sign and waive any of my rights or any of Franklin Quest Co.'s liability. I was told by Jeff Butler that he had been told to "fix the East" and "cut heads" because of the approaching merger with Covey. Jeff Butler went on to say that this decision was a tragedy because of the effort that I had made without a manager, without a project partner and because of the business developed in the previous quarter for the future. He was visibly relieved when I asked if there was anyway this decision could be reversed.

12. I was astounded because in the three months prior to this event, I had received constant affirmations from Jeff Shumway that I was a "class act" and that when the merger was completed there would be space for everyone currently working for both Franklin and Covey in the new organization - i.e. no firings were intended.

13. I asked if the decision to eliminate my position was negotiable and was told that it was. I immediately contacted Jeff Shumway and he told me that he had heard that I wished to negotiate and said, yet again, that I was a "first class act" and that he looked forward to receiving my proposal to remain with Franklin Quest Co.

14. For the next several days, I worked hard on a straight commission proposal that would have left me whole and left the company without risk if I did not perform. I negotiated in good faith for a week fully expecting that Jeff Shumway would stand by his commitment to "keep me whole" until the new organization was in place in September, 1997, after which time I could return to my former status and be rewarded in exactly the same way as all other client partners(the new title for AEs).

15. I proposed to Franklin Quest Co. that I be paid on a commission basis only and for it to be set around the average commissions paid to others in the organization (between 15% & 20%). Franklin Quest Co. refused and their final offer was a commission rate of 9% of sales after some fixed costs, an equivalent rate of 6.3%. I had no alternative but to accept. This was effectively a cutting of my income by 60%. I, to this day, fail to understand why Franklin Quest Co. did not accept my initial proposal since it provided for no risk to them but rewarded me adequately if I performed as usual. This was my fourth experience with Franklin Quest Co.'s arbitrary and capricious behavior that benefited the company to my detriment. Franklin Quest Co. knew that I could not obtain work elsewhere in the U.S. immediately, as my work permit only allowed me to work for them. Therefore, I accepted their non negotiable offer.

16. Once again Jeff Shumway assured me that he held me in "high regard professionally" and continued to refer to me as a "class act." Others in the company told me that everyone "marveled" at how I had handled the situation and that I could expect different treatment in the future as a result. Even during the week I was temporarily unemployed, I continued to serve my clients in a demonstration of my good faith. Mr. Shumway again assured me that I would be "made whole" again when the merger

with the Covey Co. was completed in September, apologized for the whole affair and expressed his hopes that I would continue to be a part of the team.

17. The new arrangement imposed extreme hardships on my family and me. My income had been cut by 60% with no notice and no time to plan for this outcome. This produced both financial hardship and emotional distress.

18. From April 8th 1997 until September 12th 1997 I fully participated in business development both as an individual and as a team member supporting my colleagues in their business endeavors. This has always been my modus operandi as many of my former colleagues will attest and has been the hallmark of the success of every team with whom I have been involved. It was exciting for me to learn, during this period, that future compensations would reflect much more of the collegiate and client relationship efforts than in the past. It was also exciting for me to learn that there would be no reduction in headcount as a result of the merger. I met and exceeded my training income goals during this time and began to make inroads into the project goals set for the year.

19. Although I was being compensated on unadvantageous commission I willingly participated in events for the greater good of the company, acting in good faith as a part of my investment for the future and truly believing that Franklin Quest Co. was operating in good faith. One example of this was my business relationship with GEC. Since 1995 I had been developing this from my Maryland office with the U.S. subsidiary of this UK company based in New Jersey. GEC has businesses located throughout the Americas. GEC was a former client of mine in the UK. Early in 1997 the director of training for GEC worldwide asked the U.S. subsidiary to set up meetings with training vendors in the U.S. who had the capability to design and deliver GEC based training programs . My contact approached me to set up meetings with senior Franklin people in Utah and stressed the magnitude of business potential worldwide for Franklin. This I did acting as liaison and agenda developer between the director of training in the UK and senior management in Utah. While it was not among the duties I was assigned I undertook it because I believed that everyone in Franklin would benefit substantially.

20. Three weeks before the meeting date I was asked by Jeff Butler to fly to Utah for the meeting to act as host and resolve any cross cultural issues. No compensation was offered for this trip or these services. I agreed believing, as I was led to believe by Franklin Quest Co. management, that after this temporary setback, I would be made whole. No contracts were entered into during this meeting nor orders placed nor money changed hands and the outcome was an opportunity for Franklin to submit a business proposal to GEC.

21. I attended a regional conference in Boston at the beginning of August. At this conference I was assigned my new role as client partner and met with colleagues who would be members of the same team based in Washington D.C. There we began the process of working together to assign territories and clients. Compensation plans had not been finalized and once again I was assured by Jeff Shumway that I would be compensated in the same way as all the others; we would share a pool of salary and commission in a graded structure based on past performance with the company in the areas of income goals, team relationships, and client development. Territories and

clients were not resolved at the conference and we continued to work on these as a team the following week in D.C.

22. We were scheduled to come together as the new Franklin Covey Co. sales organization in Utah on August the 20th. when the final compensation plans and assigned territories would be agreed. Since I had not heard about compensation I asked Mr. Shumway and others. I was continually assured that I would receive the same compensation package as all other sales employees. I left Maryland for a vacation with my family the second week of August but remained in daily contact with my colleagues in Maryland as we continued to discuss territories and clients. I had been personally invited by Kevin Cope, the Senior Vice President of Sales to attend the sales conference in Utah the week of August 18, 1997. Accordingly, my family and I planned that I would be in Utah at that time.

23. In addition, I was asked to participate in a panel discussion presentation at the Utah meeting. I was told it was due to my depth of knowledge, and my experience in cross selling the vast range of company products and services. During my vacation I spent considerable time readying my presentation and discussing it with other colleagues who would be participating.

24. On August 20th I left my vacation home very early in the morning and was driven by my wife and children to a commuter bus stop. The trip to the airport was a two hour trip by bus. I arrived at the airport, checked my bags for the flight and prior to boarding checked my voice mail one more time. There was a message from Mr. Shumway asking me to call him before I boarded the plane. I complied and was told by Mr. Shumway not to come to Utah. That I was to be fired again. Upper management had decided to cut headcount. He went on to say that he was engrossed with the sales conference and would get back to me in a couple of days. At that point I had to break contact with Mr. Shumway in order to get my luggage that was already loaded onto the airplane. I heard nothing further from Mr. Shumway.

25. I initiated contact with Mr. Shumway on August 25th by faxing a letter to him asking for an explanation. Despite all of the uncertainty I continued to serve my clients and support colleagues and informed Mr. Shumway of this fact in my letter. Mr. Shumway left a variety of messages on my answering machine that seemed to indicate that I had been terminated because of "headcount" although at other times he contradicted himself. (This was further complicated by the fact that when I finally obtained a copy of my personnel file from Franklin Covey Co. the information in the file indicated that I had resigned rather than been terminated.)

26. I received a phone call at my home in Maryland from Joyce Smith from Franklin Covey Co. on Monday, September 15th, 1997 confirming that my employment was terminated as of September 12th, 1997. There were no arrangements or suggestions of arrangements for compensating for the time I had spent in August and September.

27. Thirteen days after I sent him a letter Mr. Shumway called and left me a message which did nothing to clarify things. There followed a time during which I continually received calls from Mr. Shumway and from Jim Goodro, the person in Utah who had been assigned my accounts for information concerning those accounts. Since I was no

longer a Franklin Covey Co. employee and worked on straight commission I requested compensation for any efforts Franklin Covey Co. wanted me to expend and for the time wasted in traveling to the airport and back in August. Mr. Shumway refused and accused me of betraying "our friendship."

28. At that point I consulted my attorney in Maryland. Franklin Covey Co. was informed of this and asked to deal with my attorney directly. Still calls came to me from Mr. Shumway until I left him a message directing him to direct all further calls to my attorney. After prolonged negotiations, I finally received a copy of my personnel file, which contained several inaccuracies, and compensation allegedly for commissions earned by me up to including September 12, 1997. (Even the personnel file came with a cover letter on Franklin Covey Co. letterhead.) In return for the check (from Franklin Covey Co.) I signed a released which is attached to the plaintiff's motion as Attachment B. This release was carefully drafted to ensure that I waived none of my rights except as to the compensation being paid. Franklin Covey Co. withheld sending me the monies until they received the signed release. Evidently they found it acceptable at that time because they did send the check.

29. When I entered into the new employment contract with Franklin Covey Co. in April, 1997 it did contain the sentence "according to Franklin policy, commissions are paid only for those services delivered while you are employed by Franklin." My interpretation at the time I signed (which remains the same today) was that Franklin Covey Co. would act in good faith and not fire me in bad faith. Then, if I chose to leave Franklin Covey Co. voluntarily I would forfeit my right to receive further commissions. I knew of no cases where Franklin Covey Co. had fired employees in the past and believed that the only likely scenario was voluntary departure and parting of the ways. I never dreamt that I would be led on to produce as much revenue for Franklin Covey Co. as possible within the confines of the April, 1997, agreement and then summarily fired in bad faith before I could collect for my effort and hard work.

30. Franklin Covey Co. did not pay me all of the compensation that it admitted I was due when I was terminated. It was necessary for me to engage an attorney to try to get the money that Franklin Covey Co. owed me for sales that were completed before I left. I chose to negotiate the matter of other commissions separately because I desparately needed that money and Franklin Covey Co. had shown its willingness to violate Maryland law, which requires an employer to pay final compensation promptly.

31. Given the hard time we had collecting the monies due me up to September 12, 1997, it was clear that Franklin Covey Co. was not willing to do the right thing by me. I asked my attorney to file suit for the additional compensation. Up to that point any request for compensation by me, for the wasted day in Boston for example, had been ignored by Franklin Covey Co. Accordingly my attorney in Maryland drafted a complaint and informed me that it was his practice to encourage negotiation instead of litigation. Therefore, he suggested we send the complaint with a letter to Franklin Covey Co. first and see if matters could be worked out. My attorney sent the letter on February 5, 1998. We heard no response of any kind from anyone at Franklin Covey Co. On Saturday February 14, 1998, I was at my home giving a bottle to our infant son in preparation for his nap. The doorbell rang and I went to answer it because both my wife and older son were upstairs and could not hear it. At the door

was a stranger who demanded to know if I was David Melvin. He held up a card which I could not read and put it immediately back into his pocket. I confirmed that I was David Melvin and asked him his business. Once again he flashed his card at me, produced a set of papers,. made a notation on them as to the time and date , handed them to me and left. His manner was decidedly hostile. The contents turned out to be a summons to answer to a case filed in Utah state court by a company called Franklin Covey Client Sales, a company with whom I have had no dealings. I understand that I could have received this summons by mail, return receipt requested, or some other method and believe that the plaintiff chose this method as it would produce the maximum amount of intimidation potential.

32. The attached documents are true and accurate copies of documents referenced in this supplemental declaration and elsewhere. Among other things, they establish that my dealings were with Franklin Covey Co. and that I never entered into an employment relationship with Franklin Covey Client Sales, Inc..

I declare under penalties of perjury that the foregoing is true and correct.

Date: April 30 1996 _____

David Melvin

ATTACHMENT D

MANNING CURTIS BRADSHAW & BEDNAR, LLC
ATTORNEYS • AT • LAW

370 EAST SOUTH TEMPLE
SUITE 200
SALT LAKE CITY, UT 84111
801 363-5678
FAX 801 364-5678

STEVEN C BEDNAR
SBEDNAR@MC2B COM

June 30, 1998

Via Facsimile and U.S. Mail
(301) 593-2987

David Melvin
812 Whittington Terrace
Silver Spring, Maryland 20901

Re: *Franklin Covey Client Sales, Inc. v. David Melvin*
Civil No. 980901616MI

Dear Mr. Melvin:

I have enclosed an original of the written Order containing the rulings made by Judge Young on June 26, 1998. These have been prepared at Judge Young's instruction. Pursuant to Rule 4-504 of the Utah Code of Judicial Administration, you have five days to sign this Order and return it to me or to submit your objections.

Very truly yours,

Manning Curtis Bradshaw & Bednar, LLC

By: _____
Steven C. Bednar
Attorneys for Franklin Covey Client Sales, Inc.
and Franklin Covey Co.

Enclosure
cc: Mark Hessel (w/encs.)

MANNING CURTIS BRADSHAW
& BEDNAR, LLC
Steven C. Bednar #5660
Candice Anderson #7456
370 East South Temple, Suite 200
Salt Lake City, UT 84111
Telephone: (801) 363-5678

Attorneys for Plaintiff Franklin Covey
Client Sales, Inc.

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

FRANKLIN COVEY CLIENT SALES, INC., a Utah corporation, Plaintiff, v. DAVID MELVIN, an individual, Defendant.	)	**ORDER** Civil No. 980901616 MI Judge David S. Young

Defendant David Melvin's Motion(s) to Dismiss and Plaintiff Franklin Covey Client Sales, Inc.'s Motion for Summary Judgment came before the Court on July 26, 1998. Steven C. Bednar appeared on behalf of Plaintiff Franklin Covey Client Sales, Inc. and on behalf of Franklin Covey Co.[1] Defendant David Melvin did not appear at the hearing. The Court

[1]Franklin Covey Co. is not a named party to this action but has previously filed a pleading entitled Consent to Be Bound By Judgment and Assignment.

announced the rulings set forth in this Order based upon the Memoranda submitted by the parties and without oral argument.

The Court, having read briefs and memoranda submitted by the parties and the accompanying attachments and having considered the relevant authorities, hereby orders as follows: Defendant's Motion(s) to Dismiss are hereby DENIED.[2] With respect to Plaintiff Franklin Covey Client Sales, Inc.'s Motion for Summary Judgment, there are no genuine issues of material fact and Plaintiff is entitled to judgment as a matter of law. Plaintiff's Motion for Summary Judgment is therefore GRANTED.

DATED this _____ day of _____, 1998.

BY THE COURT:

_____
David S. Young
Third District Court Judge

APPROVED AS TO FORM

_____
David Melvin

[2]Defendant David Melvin filed a Motion to Dismiss or in the Alternative to Change Venue while this action was pending in the United States District Court for the District of Utah. Defendant also filed a Motion to Dismiss after remand to this Court. Both Motions assert a lack of personal jurisdiction which the Court finds unmeritorious. The Alterative Motion to Transfer Venue raised in Defendant's First Motion to Dismiss became moot upon remand. Other arguments raised in Defendant's Motion(s) to Dismiss are subsumed in this Court's ruling on Plaintiff's Motion for Summary Judgment.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing ORDER to be sent, via facsimile and U.S. Mail, postage prepaid this ____ day of June, 1998 to the following:

Mark L. Hessel, Esq.
Suite 307
11501 Georgia Avenue
Wheaton, MD 20902

David Melvin
812 Whittington Terrace
Silver Spring, Maryland 20901

_____

ATTACHMENT E

MANNING CURTIS BRADSHAW & BEDNAR, LLC
ATTORNEYS • AT • LAW

370 EAST SOUTH TEMPLE
SUITE 200
SALT LAKE CITY, UT 84111
801 363-5678
FAX 801 364-5678

STEVEN C. BEDNAR
SBEDNAR@MC2B.COM

July 10, 1998

David Melvin
812 Whittington Terrace
Silver Spring, Maryland 20901

Re: *Franklin Covey Client Sales, Inc. v. David Melvin*
Civil No. 980901616MI

Dear Mr. Melvin:

I enclose for your review and approval as to form a Declaratory Judgment in the above-referenced matter. This is furnished to you pursuant to Rule 4-504 of the Utah Code of Judicial Administration.

Very truly yours,

Manning Curtis Bradshaw & Bednar, LLC

By: _____
Steven C. Bednar
Attorneys for Franklin Covey Client Sales, Inc.
and Franklin Covey Co.

Enclosure
cc: Mark L. Hessel, Esq.

MANNING CURTIS BRADSHAW
& BEDNAR, LLC
Steven C. Bednar #5660
Candice Anderson #7456
370 East South Temple, Suite 200
Salt Lake City, UT 84111
Telephone: (801) 363-5678

Attorneys for Plaintiff Franklin Covey
Client Sales, Inc.

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

FRANKLIN COVEY CLIENT SALES, INC., a Utah corporation, Plaintiff, v. DAVID MELVIN, an individual, Defendant.	)	**DECLARATORY JUDGMENT** Civil No. 980901616 MI Judge David S. Young

The Court hereby enters judgment in this Declaratory Judgment Action as follows:

1. Plaintiff Franklin Covey Client Sales, Inc. is a "person interested" under the Utah Declaratory Judgment Act, Utah Code Ann. § 78-33-1 *et seq.* Plaintiff is a wholly-owned subsidiary of Franklin Covey Co. Franklin Covey Co. has consented to be bound by the Judgment filed in this action to the same extent as Plaintiff. This Declaratory Judgment is

therefore binding upon both Franklin Covey Client Sales, Inc. and Franklin Covey Co. (hereinafter "Franklin Covey.")[1]

2. The Court hereby declares the rights, status, legal relations and obligations of Franklin Covey and Defendant Melvin arising from Defendant Melvin's employment with Franklin Covey as follows: (1) Franklin Covey has no contractual, implied or other obligation to pay Defendant Melvin commissions or any other compensation related to seminars held or future seminars scheduled to be held or products sold subsequent to the September 12, 1997 effective date of Defendant Melvin's separation from Franklin Covey; (2) the Release signed by Defendant Melvin on November 13, 1997 bars all claims related to payment of compensation or commissions for services performed by Melvin during his employment with Franklin; and (3) Franklin's policy and practice with respect to the payment of commissions to separated Account Executives is not violative of law.[2]

3. The parties shall each bear their own costs and attorneys' fees in this action.

DATED this _____ day of July, 1998.

BY THE COURT:

_____
David S. Young
Third District Court Judge

[1]The Court acknowledges that Defendant Melvin contends that his actual employer was Franklin Covey Co. and not Franklin Covey Client Sales, Inc. However, the Court finds that it is immaterial whether Defendant Melvin was employed by Franklin Covey Client Sales, Inc. or Franklin Covey Co. This action concerns only one employee, one employer, and only one employment relationship. The relevant terms of Defendant Melvin's employment relationship are established by an undisputed compensation agreement under which the rights, status, and legal relations of the parties are hereby determined.

[2] The Court finds that the declaratory relief furnished herein is required under both Utah and Maryland law. The Court is therefore not required to determine which law applies to this dispute.

APPROVED AS TO FORM:

_____

David Melvin

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing DECLARATORY JUDGMENT to be sent, via facsimile and U.S. Mail, postage prepaid this 10th day of July, 1998 to the following:

Mark L. Hessel, Esq.
Suite 307
11501 Georgia Avenue
Wheaton, MD 20902

David Melvin
812 Whittington Terrace
Silver Spring, Maryland 20901